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2 **UNITED STATES DISTRICT COURT**
3
4 **DISTRICT OF OREGON**
5 **PORTLAND DIVISION**

6 KAREN SALAZAR,)
7 Plaintiff,) No. 03:10-cv-00895-HU
8 vs.)
9 MICHAEL J. ASTRUE,) **FINDINGS AND RECOMMENDATION**
10 Commissioner of Social Security,) **ON MOTION FOR EAJA FEES**
11 Defendant.)
12

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1 HUBEL, United States Magistrate Judge:

2 The plaintiff Karen Salazar brought this action for judicial
3 review of the Commissioner's decision denying her application for
4 Disability Insurance ("DI") benefits under Title II of the Social
5 Security Act, 42 U.S.C. § 1381 et seq. In Findings and Recom-
6 mendation entered January 25, 2012, the undersigned recommended
7 that the Commissioner's decision be reversed, and the case be
8 remanded for further proceedings. Dkt. #20. The Commissioner
9 filed objections to my recommendation, and Salazar filed a
10 response. Dkt. ##22 & 23, respectively. Judge Michael W. Mosman
11 overruled the Commissioner's objections, adopted my recommendation,
12 and entered judgment for Salazar on March 13, 2012. Dkt. ##24 &
13 25.

14 Salazar now moves for an award of attorney's fees under the
15 Equal Access to Justice Act, 28 U.S.C. § 2412 (EAJA), in the amount
16 of \$6,146.08. Dkt. ##26, 27, & 28. EAJA provides for an award of
17 attorney's fees to a prevailing plaintiff in a Social Security
18 appeal, "unless the court finds that the position of the United
19 States was substantially justified or that special circumstances
20 make an award unjust." 28 U.S.C. § 2412(d). The Commissioner
21 objects to an award of fees under EAJA, arguing his position in the
22 case was, in fact, substantially justified. Dkt. #29. Although
23 the Commissioner concedes Salazar was the prevailing party in the
24 case under applicable law, he asserts that fact does not auto-
25 matically entitle her to attorney's fees under EAJA. *Id.*

26 The Commissioner's position "'is substantially justified if
27 his position met the traditional reasonableness standard - that is
28 justified in substance or in the main, or to a degree that could

1 satisfy a reasonable person.'" *Johnson v. Astrue*, slip op., 2012
 2 WL 2129387, at *1 (9th Cir. June 13, 2012) (quoting *Lewis v.*
 3 *Barnhart*, 281 F.3d 1081, 1083 (9th Cir. 2005) (internal quotation
 4 marks omitted)). "Put another way, substantially justified means
 5 there is a dispute over which reasonable minds could differ." *Gonzales v. Free Speech Coalition*, 408 F.3d 613, 618 (9th Cir.
 6 2005) (internal quotation marks, citation omitted). The Commis-
 7 sioner's "position" in the case includes both his litigating
 8 position, and "'the action or failure to act by the agency upon
 9 which the civil action is based.'" *Wilderness Society v. Babbitt*,
 10 5 F.3d 383, 388 (9th Cir. 1993) (quoting *Abela v. Gustafson*, 888
 11 F.2d 1258, 1264 (9th Cir. 1989)). The fact that the Commissioner
 12 "did not prevail on the positions he has taken does not invoke a
 13 presumption that he was not substantially justified." *Renee v.*
 14 *Duncan*, 686 F.3d 1002, 1017 (9th Cir. 2012); see *Pierce v.*
 15 *Underwood*, 487 U.S. 552, 569, 108 S. Ct. 2541, 2552, 101 L. Ed. 2d
 16 490 (1988) (recognizing the possibility that the Commissioner could
 17 win on an argument that *is not* substantially justified, and also
 18 could lose on a position that *is* substantially justified). The
 19 Commissioner has the burden to show his position "had a reasonable
 20 basis in both law and fact." *Loring v. Astrue*, slip op., 2012 WL
 21 1598291, at *1 (D. Or. May 7, 2012) (Simon, J.) (citing *Kali v.*
 22 *Bowen*, 854 F.2d 329, 332 (9th Cir. 1988)).

24 Notably, it is an abuse of discretion for the court to find,
 25 on the merits, that the agency's position was contrary to the
 26 constitution, federal statute, or the agency's own regulations, but
 27 then to find the agency's position in the case was substantially
 28 justified. *Sampson v. Chater*, 103 F.3d 918, 921 (9th Cir. 1996)

1 (citation omitted). Indeed, the Ninth Circuit has observed that
2 "it will be only a decidedly unusual case in which there is
3 substantial justification under the EAJA even though the agency's
4 decision was reversed as lacking in reasonable, substantial and
5 probative evidence in the record." *Thangaraja v. Gonzales*, 428
6 F.3d 870, 874 (9th Cir. 2005) (internal quotation marks, citation
7 omitted).

8 In the present case, Salazar argued the ALJ erred in several
9 respects. She disagreed with the ALJ's residual functional
10 capacity finding, arguing he failed to consider some of her
11 restrictions in his assessment, and he failed to include all of her
12 restrictions in hypothetical questions to the vocational expert.
13 She also argued the ALJ's credibility assessment was erroneous, and
14 the ALJ improperly found she has transferable skills. In addition,
15 she argued the Appeals Council erred in finding a report from her
16 treating Nurse Practitioner did not warrant remand. See Dkt. ## 17
17 & 19.

18 In my Findings and Recommendation, I found no error in the
19 ALJ's determination that Salazar had acquired job skills in her
20 past work as a school bus driver that would transfer to jobs
21 identified by the vocational expert. However, in other respects,
22 I agreed with Salazar. I found the ALJ relied on erroneous reports
23 from state agency consultants, and erred in assessing Salazar's
24 credibility. I further found the Appeals Council erred in failing
25 to remand the case for further consideration on the basis of a
26 supplemental opinion by Salazar's treating Nurse Practitioner. I
27 found the opinion to be material, and that it should have resulted
28

1 in remand of the case to the ALJ for further development of the
2 record. See Dkt. #20.

3 The Commissioner particularly objected to my findings
4 regarding treatment of the Nurse Practitioner's report. He also
5 argued the action of the Appeals Council in denying Salazar's
6 request for review was not subject to judicial review. See Dkt.
7 ##18 & 22. As noted above, Judge Mosman overruled those
8 objections, and adopted my Findings and Recommendation in full.
9 Dkt. #24. In the Commissioner's opposition to Salazar's request
10 for EAJA fees, he argues the positions he took in the case had a
11 reasonable basis in law. He effectively renews his arguments in
12 support of the ALJ's reliance on the consultants' reports,
13 assessment of Salazar's credibility, and weighing of the evidence,
14 as well as his continuing argument that the Appeals Council's
15 action was not subject to judicial review. Dkt. #29.

16 I find the Commissioner's arguments unpersuasive. Except with
17 regard to the transferability of Salazar's skills, I find the
18 Commissioner's position on the merits of the case was not
19 substantially justified, and Salazar is entitled to an award of
20 EAJA fees. Having so found, "[i]t remains for the district court
21 to determine what fee is 'reasonable.'" *Hensley v. Eckerhart*, 461
22 U.S. 424, 433, 103 S. Ct. 1933, 1939, 76 L. Ed. 2d 40 (1983). The
23 *Hensley* court observed that "[t]he most useful starting point for
24 determining the amount of a reasonable fee is the number of hours
25 reasonably expended on the litigation multiplied by a reasonable
26 hourly rate," *id.*, which calculation results in a "lodestar." *Webb*
27 *v. Ada County, Idaho*, 195 F.3d 524, 527 (9th Cir. 1999) (citing
28 *McGrath v. County of Nevada*, 67 F.3d 248, 252 (9th Cir. 1995)).

1 The lodestar may be adjusted to reflect the results obtained in the
 2 case. *Id.* (citing *Schwarz v. Sec'y of Health & Human Servs.*, 73
 3 F.3d 895, 901 (9th Cir. 1995)). The district court enjoys
 4 "considerable discretion . . . in determining what attorney's fee
 5 is reasonable." *Id.*

6 The court first will look at "the number of hours reasonably
 7 expended on the litigation." *Hensley, supra.* The time records
 8 submitted with Salazar's motion indicate that attorney Tim Wilborn
 9 expended 18.50 hours in this case (6.0 hours in 2010, 6.1 hours in
 10 2011, and 6.4 hours in 2012); and attorney Betsy Stephens expended
 11 15.55 hours in the case (11.25 hours in 2011, and 4.3 hours in
 12 2012); for a total of 34.05 hours. Preliminarily, the court notes
 13 that an expenditure of 34.05 hours falls within the twenty-to-
 14 forty-hour range Judge Michael W. Mosman found to be a "reasonable
 15 amount of time to spend on a social security case that does not
 16 present particular difficulty." *Harden v. Comm'r*, 497 F. Supp. 2d
 17 1214, 1215 (D. Or. 2007) (noting "some consensus among the district
 18 courts" on this point; citing cases). Judge Mosman agreed that
 19 "[a]bsent unusual circumstances or complexity, . . . this range
 20 provides an accurate framework for measuring whether the amount of
 21 time counsel spent is reasonable." *Id.*

22 In the present case, the administrative record was 285 pages
 23 long - a very short record compared to most Social Security cases
 24 submitted to this court for review. Salazar's opening brief was
 25 twenty pages long, eleven pages of which comprised detailed legal
 26 argument on four assertions of error. The Commissioner filed a
 27 twelve-page responsive brief, and Salazar filed a nine-page reply
 28 brief. In addition, counsel expended 7.4 hours reviewing my

1 Findings and Recommendation and the Commissioner's objections
 2 thereto, and preparing a response to the objections that ultimately
 3 resulted in a judgment in Salazar's favor. The attorneys' time
 4 records indicate the time expended by counsel in this case was
 5 reasonable. None of the entries represents clerical or secretarial
 6 tasks not payable under EAJA. See, e.g., *Gough v. Apfel*, 133
 7 F. Supp. 2d 878, 881 (W.D. Va. 2001) (noting that "[p]urely
 8 clerical activities, regardless of who performs them, are
 9 considered overhead and are not compensable as EAJA attorney
 10 fees"). In addition, counsel's work did not overlap and they have
 11 not billed for duplicate time spent on the same tasks. Although
 12 both co-counsel worked on Salazar's opening and reply briefs, and
 13 responding to the Commissioner's objections to my Findings and
 14 Recommendation, the total time spent on these tasks was reasonable
 15 and appropriate (i.e., a total of 11.15 hours on the opening brief,
 16 4.35 hours on the reply brief, and 7.4 hours to review the Findings
 17 and Recommendation and respond to the Commissioner's objections).
 18 I therefore conclude that the total attorney time of 34.05 hours is
 19 reasonable under the circumstances.

20 In considering the applicable hourly rate, the statute itself
 21 sets a \$125 per hour ceiling "unless the court determines that an
 22 increase in the cost of living . . . justifies a higher fee." 28
 23 U.S.C. § 2412(d)(2)(A).¹ To adjust for the cost of living, the
 24 Ninth Circuit applies the national Consumer Price Index for All
 25 Urban Consumers (the "CPI-U"), not seasonally adjusted, and
 26

27 ¹Congress raised the rate for EAJA fees from \$75 to \$125 per
 28 hour in 1996. The CPI-U index, all items, not seasonally adjusted
 for 1996, was 155.7.

1 applying the "all items" index. *Jones v. Espy*, 10 F.3d 690, 692-93
 2 (9th Cir. 1993). The cost-of-living increase is "calculated by
 3 multiplying the \$125 statutory maximum hourly rate by the . . .
 4 CPI-U for the years in which the attorney's work was performed and
 5 dividing by the CPI-U figure for March 1996 (155.7), the effective
 6 date of the statutory maximum hourly rate." *Nadarajah v. Holder*,
 7 569 F.3d 906, 918 (9th Cir. 2009) (citing *Thangaraja v. Gonzales*,
 8 428 F.3d 870, 876-77 (9th Cir. 2005)).

9 The EAJA-adjusted hourly rate for 2010 is \$175.06²; for 2011
 10 is \$180.59³; and for 2012 is \$184.95.⁴ Multiplying counsels' hours
 11 for the respective years results in attorney fees of \$1,050.36 for
 12 2010 (6.0 hours x \$175.06); \$3,133.24 for 2011 (17.35 hours x
 13 \$180.59); and \$1,978.97 for 2012 (10.7 x \$184.95); for a total of
 14 \$6,142.57 for all three years.⁵

15 Accordingly, I recommend that Salazar's motion for EAJA fees
 16 in the amount of \$6,146.08 (Dkt. #26) be granted, and she be
 17 awarded attorneys' fees in that amount.

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23 ²\$125 x (2010 annual index of 218.056/155.7) = \$175.06.

24 ³\$125 x (2011 annual index of 224.939/155.7) = \$180.59.

25 ⁴\$125 x (2012 index for August, the most recently-available
 month, of 230.379/155.7) = \$184.95.

26 ⁵This amount is \$16.49 more than the amount requested by
 27 counsel in the motion. Counsel's calculation for the 2012 fees was
 28 based on the 2012 index for an earlier month, because the August
 index was not yet available at the time the motion was filed.

SCHEDULING ORDER

2 These Findings and Recommendation will be referred to a
3 district judge. Objections, if any, are due **October 8, 2012**. If no
4 objections are filed, then the Findings and Recommendation will go
5 under advisement on that date. If objections are filed, then a
6 response is due by **October 25, 2012**. When the response is due or
7 filed, whichever date is earlier, the Findings and Recommendation
8 will go under advisement.

IT IS SO ORDERED.

Dated this 19th day of September, 2012.

/s/ Dennis J. Hubel

Dennis James Hubel
United States Magistrate Judge